Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Processing Order for Applications	)	FCC 99-240
Filed Pursuant to the Commission's	)	
New Local Broadcast Ownership Rules	)	
	)	
Review of the Commission's Regulations	)	MM Docket No. 91-221
Governing Television Broadcasting	)	
	)	
Television Satellite Stations	)	MM Docket No. 87-8
Review of Policy and Rules	)	

REPLY COMMENTS OF OFFICE OF COMMUNICATION INC. OF THE UNITED CHURCH OF CHRIST BLACK CITIZENS FOR A FAIR MEDIA CENTER FOR MEDIA EDUCATION WASHINGTON AREA CITIZENS COALITION INTERESTED IN VIEWER'S CONSTITUTIONAL RIGHTS

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October 12, 1999

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The Office of Communication Inc. of the United Church of Christ ("UCC"), Black Citizens for a Fair Media, Center for Media Education, and Washington Areas Citizens Coalition Interested in Viewer's Constitutional Rights respectfully submit these reply comments in response to comments on the Federal Communications Commission's ("FCC" or "Commission") *Processing Order for Applications Filed Pursuant to the Commission's New Local Broadcast Ownership Rules*, Public Notice, FCC 99-240 (rel. Sept. 9, 1999) ("Public Notice").

UCC *et al.* oppose most of the alternative proposals suggested by other commenters for determining the processing order of transfer applications in this case. A first-to-contract approach is not only unwieldy, but also ignores the interests of the public. Similarly, the suggestion that broadcasters should be allotted a negotiation period to decide among themselves the order of process is unseemly and contrary to the public interest. A point system, which we

proposed in our initial comments, remains the most equitable, reasonable and lawful means to process the transfer applications and will best serve the public interest. Finally, we disagree with commenters who urge that parties to an LMA should be given special privileges in the processing order of transfer applications.

I. NEITHER A FIRST-TO-CONTRACT APPROACH NOR A PERIOD TO NEGOTIATE PRIVATE SETTLEMENTS WILL ENSURE THAT THE PUBLIC INTEREST IS SERVED

CBS and Viacom have suggested that the Commission resolve conflicts on a first-to-contract basis. The Tribune Broadcasting Company (Tribune) has suggested that parties with pre-existing relationships be allotted a 30 to 60 day period prior to conducting lotteries in order to negotiate a settlement among themselves to determine the order of process. However, neither method will engage in any analysis of what is best for the public and both suggestions have implementation problems.

A. The first-to-contract method is not viable as a way to determine the processing order for transfer applications.

CBS and Viacom suggest that the Commission process transfer applications beginning with those applicants who were the first to contract with one another for a transfer. *See* CBS Comments at 7; Viacom Comments at 2. However, the speed with which one enters into a contract does not mean that one will best serve the interests of the public. At best, speed in contracting merely reveals a substantial interest in entering a certain market and the wherewithal to quickly do so. Were the Commission to solely consider the first-to-contract, the Commission would be ignoring all other relevant factors. The Commission has a statutory obligation to grant

transfer applications in the public interest. It cannot disregard this duty and reduce such an important decision solely to the date stamped on an agreement.

First-to-contract would also be difficult to implement. The very term "contract" as defined by CBS and Viacom presents problems because it is too vague. CBS suggests that a "contract" can be any definitive agreement that the parties have executed or publicly announced will suffice to determine who has priority. *See* CBS Comments at 7. CBS's broad reading of applicable agreements is problematic because it extends the definition of a contract so far as to render it meaningless. The problem is exacerbated by CBS's failure to indicate what type of "contract" would prevail in a dispute. It is unclear which contract would have priority - a written contract, a verbal agreement or a press release. The suggestion that a public announcement of an agreement can establish a date of contract is itself problematic. Stations could easily announce tentative agreements to transfer in order to beat out competitors, notwithstanding CBS's qualification that *bona fide* agreements or announcements should be given precedence. *See* CBS Comments at 10. Given the millions of dollars at stake and the obvious room for manipulation, even *bona fide* agreements or announcements may be suspect.

CBS asserts that the use of a first-to-contract system will be easy to implement because the burden of determining the date of contract could be easily placed upon the applicants themselves. *See* CBS Comments at 11. But the Commission cannot give the applicants such latitude because the parties would have every incentive and opportunity in this case to manipulate the documents to reflect the earliest possible date. Such an adversarial approach is also inherently inefficient. In light of the high stakes involved, parties will endlessly litigate over

whose contract was first, thus eliminating any perceived efficiencies of a first-to-contract approach.

B. Allowing stations with prior relationships to negotiate settlements prior to the implementation of a lottery is unseemly and possibly illegal.

Tribune suggests that the Commission establish three categories of applicants based upon pre-existing relationships and within each category provide the parties a 30 to 60 day period to negotiate settlements before conducting a lottery. *See* Tribune Comments at 4. Tribune's proposal presents serious difficulties. Stations should not be allowed to negotiate settlements to determine whose transfer application should be approved because a private negotiation process will not select the applicant who will best serve the public interest. Neither the Commission nor the community will have a voice in the determination. Private settlements between broadcasters would allow an unaccountable industry to keep the decision making behind closed doors and completely under the industry's control. The public has the right to participate in the broadcast licensing procedures of the Commission. *See generally Office of Communication of the United Church of Christ v. FCC,* 359 F.2d 994 (D.C. App. 1966). Allowing stations to select the applicant is irreconcilable with the exercise of this right.

Furthermore, permitting stations to decide among themselves who should be granted the transfer creates dangerous incentives to manipulate the process. For example, stations may agree to stay out of some markets in exchange for an oligopoly in others. In addition to being unseemly, the possibility of collusion raises antitrust issues. *See, e.g., United States v. Paramount Pictures, Inc.,* 334 U.S. 131 (1948) (explaining the requirements of the Sherman Act in determining when actions between parties rise to the level of an agreement to engage in anti-competitive behavior).

C. A point system remains the Commission's best option for granting mutually exclusive transfer applications in the public interest.

Most commenters agree with UCC *et al.* that using a system of random selection to determine the process of transfer applications is wrong on some level. Sinclair Broadcast Group, Inc. and Paxson Communications Corp. correctly point out that Congress revoked the Commission's authority to hold lotteries in this context. *See* Sinclair Comments at 6; Paxson Comments at 4. Other commenters, such as CBS and Viacom, note that a random method of distributing transfers makes little sense. *See* CBS Comments at 9 (noting the reasonable expectation that agencies will regulate in a manner that is not random and arbitrary); Viacom Comments at 2 (disparaging the "arbitrary result" produced by lotteries). Finally, Minority Media and Telecommunications Council (MMTC) argues that lotteries are not in the public interest. *See* MMTC Comments.[1] In light of such diverse opposition, the Commission should not employ a lottery system to determine the processing order of transfer applications.

A point system remains the best vehicle to protect the rights of the applicants while best serving the interests of the public. Industry has failed to provide an adequate alternative that incorporates both of these concerns. In fact, broadcasters cannot agree as to how the

[1] UCC *et al.* agree with MMTC's recommendation that the Commission should "bump up" a transfer that is part of a larger transaction that includes one or more spinoffs of a station to a small or disadvantaged business. *See* MMTC Comments at 1. However, UCC *et al.* believe that MMTC's proposal, although laudable, fails to take into account other relevant, easily quantifiable public interest criteria that the Commission should employ in a point system. Moreover, focusing solely on spinoffs would necessarily exclude any public interest analysis in local markets where spinoffs are not implicated.

Commission should resolve this conflict.[2] A point system is fair to the applicants, efficient and effective for the Commission, and in the best interest of communities that are served by the license transferees. Thus, the Commission should adopt a point system as proposed in our earlier Comments.

II. THE SUGGESTION THAT THE COMMISSION SHOULD EXEMPT PARTIES TO AN LMA FROM ANY SYSTEM OF AWARDING TRANSFERS IS UNTENABLE.

Some commenters generally argue that parties to a local marketing agreement (LMA) should be granted automatic ownership of their respective stations and be exempted from any transfer application process. *See generally* Association of Local Television Stations, Inc. (ALTS) Comments; National Association of Broadcasters Comments; Paxson Comments; Sinclair Comments; Tribune Comments. Commenters argue that since the two stations will be counted as one voice for diversity counting purposes, the stations should be counted as one for transfer of ownership purposes. Other commenters, such as CBS and Viacom, disagree, stating that parties to an LMA should not be exempt from any system of determining the processing order of transfer applications.

UCC *et al.* agree with CBS and Viacom that parties to an LMA are not entitled to preferential treatment. First, although LMA'ing stations may supply some programming to LMA'ed stations, LMA'ing stations simply do not have a legal ownership interest in those stations until a transfer application is approved. Therefore, their applications are no different from any other transfer applications and all applications should be subject to the same system to

[2] Considering the small number of commenters and the general disagreement with the Commission's proposal, UCC *et al.* agree with MMTC's suggestion in its Reply Comments that the Commission should arrange a meeting with all the interested parties to reach a consensus.

determine processing order. To argue otherwise would concede that LMA'ing stations have circumvented the Commission's past ownership rules prohibiting duopoly. Second, a few commenters specifically argue that LMA'ing stations should be granted automatic ownership even if the voice count in the designated market area (DMA) is less than eight voices. This argument is based on an incomplete understanding of the mechanics of the new rules. Under the new broadcast ownership rules, LMAs entered into after November 5, 1996 are subject to mandatory termination in two years if they are in violation of the new rules. *Review of the Commission's Regulations Governing Television Broadcasting, Report and Order,* FCC 99-209, at ¶142 (*TV Local Ownership Order*). Exempting LMA transfer applicants from the Commission's transfer process not only allows LMA holders to avoid any system of public interest selection, but will also automatically extinguish the possibility of future independent voices in DMAs with low voice counts.

A. All transfer applicants should be treated equally.

There is no reason to consider applicants with LMA interests differently from other transfer applicants. The Commission allows existing LMAs to continue under the new broadcast ownership rules pursuant to certain conditions. *See TV Local Ownership Order* at ¶¶ 142 - 148.[3] The Commission did not create ownership interests in LMAs in its conditioned approval of these agreements. In fact, the Commission stated in the *TV Local Ownership Order* that "parties to an LMA may seek, *just as any other applicant*, to form a duopoly or justify an LMA indefinitely

[3] LMAs that were entered into before November 5, 1996, may lawfully retain their LMA status conditioned upon a Commission review in 2004. *See TV Local Ownership Order* at ¶ 146. Stations that entered into LMAs on or after November 5, 1996 have a grace period of two years to divest themselves of attributable LMAs if they are in violation of the new rules. *Id.* at ¶ 142.

under our new rule and waiver policies." *See id.* at ¶ 147 (emphasis added). The only legal means by which anyone can seek a lawful transfer of ownership in a license is still section 310(d) of the Telecommunications Act. *See* 47 U.S.C. § 310(d). Stations involved in an LMA have no greater legal right under section 310(d) to transfer approval than any other applicant. Any exception to this rule favoring parties to an LMA is not only unfair, but would also create an incentive for stations to enter into such agreements in order to avoid any processing requirements adopted by the Commission.[4]

ALTS *et al.*'s equitable arguments falter as well. Commenters argue that LMA'ing stations should be granted ownership of LMA'ed stations automatically because of the investment they have put into the LMA'ed stations. Commenters have turned the notion of fairness on its head. For years, certain broadcasters have openly violated the spirit of the broadcast ownership rules by engaging in the inherently suspect practice of LMAs. And for years, we have consistently maintained that such practices are unlawful. Granting any privileges to applicants with LMA interests would amount to rewarding them for unlawful self-help.[5] The Commission must hold fast. The least it can do in this situation is to not grant these questionable

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[4] The Commission should be especially wary of any new LMAs entered into after the release of the TV Local Ownership Order. Such new agreements may have been entered into for the purpose of evading any new transfer application process as suggested by CBS. *See* CBS Comments at 13.

[5] On petition for reconsideration of the *TV Local Ownership Order*, UCC *et al.* will seek partial reconsideration and clarification of the Commission's decisions concerning LMAs. Because the granting of any preferential treatment to parties to an LMA in the instant proceeding is inextricably intertwined with the issues to be raised on reconsideration, UCC *et al.* wish to make clear our intention to seek a stay from the Commission and if necessary from a court to stop any implementation of such a proposal.

combinations any preferential treatment in determining the processing order of transfer applications.

B. The possibility for increasing diversity in both ownership and programming is completely eliminated in smaller markets if the Commission automatically grants license transfers to LMA holders.

A few commenters specifically argue that because the voice count will not change, LMA stations should be granted transfers automatically even if the voice count in the DMA is below eight voices. *See* ALTS Comments at 2; Paxson Comments at 6. However, commenters fail to acknowledge the deleterious effect such an approach would have in smaller markets. Commenters' proposal would essentially frustrate the new divestiture rules and prevent new voices from arising in DMAs with nine or fewer television stations where at least two stations are parties to an LMA.

For example, consider a DMA with six television stations and one LMA. Under the new rules there are currently five independent voices in that DMA. However, if the above LMA were entered into on or after November 5, 1996, this DMA should have six independent voices by August 5, 2001. Under the new ownership rules, the LMA'ing station would have to terminate the agreement within two years of the adoption date of the *TV Local Ownership Order* in order to comply with the new eight-count DMA voice test. *See TV Local Ownership Order* at ¶ 142. Thus, by August 5, 2001, there would be six independent voices in the DMA instead of five.[6] Automatically granting the LMA'ing station ownership of the station would therefore eviscerate

[6] This scenario applies to grandfathered LMAs entered into before November 5, 1996 as well. A pre-November 5, 1996 LMA is permitted to continue until 2004, at which time it will be reviewed by the Commission; the LMA'ing station may be required to divest at that time. *See TV Local Ownership Order* at ¶ 146. So in theory, even in the case of grandfathered LMAs, the DMA will have six independent voices instead of five.

the future independent voice from the market. Such a clear manipulation of its rules cannot be countenanced by the Commission.

Conclusion

The Commission should use a point system rather than a first-to-contract or negotiation system to determine the processing order for transfer applications. A point system is the only way in which the Commission can adequately address its statutory mandate to award the transfer to the applicant who best serves the public interest. Moreover, applications involving LMAs should not be allowed to circumvent this or any other method of processing transfer applications. All transfer application should be subject to the same considerations of public interest as other transfer applications.

Respectfully submitted,

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